

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LAWRENCE F. MCCLURE,
Plaintiff,

v.

L. GARCIA, et al.,
Defendants.

Case No. 16-00203 HRL (PR)

**ORDER OF SERVICE;
TERMINATING DEFENDANT M. E.
SPEARMAN FROM THIS ACTION;
DIRECTING DEFENDANTS TO
FILE DISPOSITIVE MOTION OR
NOTICE REGARDING SUCH
MOTION; INSTRUCTIONS TO
CLERK**

Plaintiff, a California state prisoner, filed the instant pro se civil rights action pursuant to 42 U.S.C. § 1983 against prison officials at the Correctional Training Facility – Soledad (“CTF”). Plaintiff’s motion for leave to proceed in forma pauperis will be addressed in a separate order.

DISCUSSION

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim

1 upon which relief may be granted or seek monetary relief from a defendant who is immune
2 from such relief. See id. § 1915A(b)(1),(2). Pro se pleadings must, however, be liberally
3 construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988).

4 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
5 elements: (1) that a right secured by the Constitution or laws of the United States was
6 violated, and (2) that the alleged violation was committed by a person acting under the
7 color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988).

8 **B. Plaintiff's Claims**

9 Plaintiff claims that on February 13, 2015, Defendant Correctional Officer L.
10 Garcia discriminated against him on the basis of his race, i.e., African-American, when he
11 took away Plaintiff's job and his pay based on a non-related incident that occurred during
12 off hours. (Docket No. 1 at 18.) Plaintiff claims that Defendant Garcia referred to him
13 using a racial slur, (id. at 3), and that he made statements indicating his bias against
14 African-American inmates, (id. at 8.) Liberally construed, Plaintiff states a cognizable
15 claim for a violation of his right to Equal Protection. See City of Cleburne v. Cleburne
16 Living Center, 473 U.S. 432, 439 (1985); Monteiro v. Tempe Union High School Dist.,
17 158 F.3d 1022, 1026 (9th Cir. 1998).

18 Plaintiff claims that Defendant Warden Spearman has refused to respond or
19 acknowledge receipt of his inmate appeal regarding Defendant Garcia's actions. (Docket
20 No. 1 at 3.) A supervisor may be liable under section 1983 upon a showing of (1) personal
21 involvement in the constitutional deprivation or (2) a sufficient causal connection between
22 the supervisor's wrongful conduct and the constitutional violation. Henry A. v. Willden,
23 678 F.3d 991, 1003-04 (9th Cir. 2012) (citing Starr v. Baca, 652 F.3d 1202, 1207 (9th Cir.
24 2011)). Plaintiff makes no other allegation against Warden Spearman other than his
25 silence, which does not indicate that Warden Spearman was either personally involved in
26 Defendant Garcia's actions or that the Warden himself engaged in any wrongful conduct
27 which caused the deprivation of Plaintiff's rights. Accordingly, Defendant Warden
28

1 Spearman is DISMISSED from this action as Plaintiff has failed to state any cognizable
2 claims against him.

4 CONCLUSION

5 For the reasons state above, the Court orders as follows:

6 1. The Clerk of the Court shall mail a Notice of Lawsuit and Request for
7 Waiver of Service of Summons, two copies of the Waiver of Service of Summons, a copy
8 of the complaint, all attachments thereto, and a copy of this order upon **Defendant**
9 **Correctional Officer L. Garcia** at the **Correctional Training Facility – Soledad (P.O.**
10 **Box 686, Soledad, CA 93960-0686)**. The Clerk shall also mail a copy of this Order to
11 Plaintiff.

12 Defendant Warden M. E. Spearman is DISMISSED from this action as Plaintiff has
13 failed to state a cognizable claim against him. The Clerk shall terminate this Defendant
14 from this action.

15 2. Defendants are cautioned that Rule 4 of the Federal Rules of Civil
16 Procedure requires them to cooperate in saving unnecessary costs of service of the
17 summons and the complaint. Pursuant to Rule 4, if Defendants, after being notified of this
18 action and asked by the Court, on behalf of Plaintiff, to waive service of the summons, fail
19 to do so, they will be required to bear the cost of such service unless good cause shown for
20 their failure to sign and return the waiver form. If service is waived, this action will
21 proceed as if Defendants had been served on the date that the waiver is filed, except that
22 pursuant to Rule 12(a)(1)(B), Defendants will not be required to serve and file an answer
23 before **sixty (60) days** from the day on which the request for waiver was sent. (This
24 allows a longer time to respond than would be required if formal service of summons is
25 necessary.) Defendants are asked to read the statement set forth at the foot of the waiver
26 form that more completely describes the duties of the parties with regard to waiver of
27 service of the summons. If service is waived after the date provided in the Notice but
28

1 before Defendants have been personally served, the Answer shall be due sixty (60) days
2 from the date on which the request for waiver was sent or twenty (20) days from the date
3 the waiver form is filed, whichever is later.

4 3. No later than **ninety (90) days** from the date of this order, Defendants shall
5 file a motion for summary judgment or other dispositive motion with respect to the claims
6 in the complaint found to be cognizable above.

7 a. Any motion for summary judgment shall be supported by adequate
8 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
9 Civil Procedure. Defendants are advised that summary judgment cannot be granted, nor
10 qualified immunity found, if material facts are in dispute. If any Defendant is of the
11 opinion that this case cannot be resolved by summary judgment, he shall so inform the
12 Court prior to the date the summary judgment motion is due.

13 b. **In the event Defendants file a motion for summary judgment, the**
14 **Ninth Circuit has held that Plaintiff must be concurrently provided the appropriate**
15 **warnings under Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See**
16 **Woods v. Carey, 684 F.3d 934, 940 (9th Cir. 2012).**

17 4. Plaintiff's opposition to the dispositive motion shall be filed with the Court
18 and served on Defendants no later than **twenty-eight (28) days** from the date Defendants'
19 motion is filed.

20 Plaintiff is also advised to read Rule 56 of the Federal Rules of Civil Procedure and
21 Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (holding party opposing summary judgment
22 must come forward with evidence showing triable issues of material fact on every essential
23 element of his claim). Plaintiff is cautioned that failure to file an opposition to
24 Defendants' motion for summary judgment may be deemed to be a consent by Plaintiff to
25 the granting of the motion, and granting of judgment against Plaintiff without a trial. See
26 Ghazali v. Moran, 46 F.3d 52, 53–54 (9th Cir. 1995) (per curiam); Brydges v. Lewis, 18
27 F.3d 651, 653 (9th Cir. 1994).

1 5. Defendants shall file a reply brief no later than **fourteen (14) days** after
2 Plaintiff's opposition is filed.

3 6. The motion shall be deemed submitted as of the date the reply brief is due.
4 No hearing will be held on the motion unless the Court so orders at a later date.

5 7. All communications by the Plaintiff with the Court must be served on
6 Defendants, or Defendants' counsel once counsel has been designated, by mailing a true
7 copy of the document to Defendants or Defendants' counsel.

8 8. Discovery may be taken in accordance with the Federal Rules of Civil
9 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local
10 Rule 16-1 is required before the parties may conduct discovery.

11 9. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the
12 court informed of any change of address and must comply with the court's orders in a
13 timely fashion. Failure to do so may result in the dismissal of this action for failure to
14 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

15 10. Extensions of time must be filed no later than the deadline sought to be
16 extended and must be accompanied by a showing of good cause.

17 **IT IS SO ORDERED.**

18
19 **Dated:** _____

6/1/16

20
21
22
23
24
25
26
27
28


HOWARD R. LLOYD
United States Magistrate Judge

Order of Service
PRO-SE\HRL\CR.16\00203McClure_svc